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December 8, 2008

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CTIA petition for declaratory ruling, Docket 08-165
Ex parte communication pursuant to Section 1.1206 of the Rules.

Dear Ms. Dortch:

On December 5, 2008, Joseph Van Eaton and I, on behalf of the Coalition for Local Zoning Authority, met with Bruce Gottlieb of the office of Commissioner Copps. We spoke from the attached document.

Please direct any questions to the undersigned.

Very truly yours,

MILLER & VAN EATON, P.L.L.C.

By

Frederick E. Ellrod III

cc: Bruce Gottlieb
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The CTIA Preemption Petition

1. CONGRESS DID NOT EMPOWER THE FCC TO ADJUDICATE OR TO MAKE RULES UNDER SECTION 332(C)(7).

a. In Section 332(c)(7) Congress did not confer ***any*** new rulemaking or adjudicative power upon the FCC, other than for RF matters. In addition, Congress expressly clarified that the FCC's authority in other sections of the Act did ***not*** apply.

i. *Alliance for Community Media, Iowa Utilities Board*, and *Brand X* are inapposite. They stand for the principle that the FCC may clarify ambiguous sections of the Communications Act because the Act confers general rulemaking authority upon the agency, and Congress chose to insert the relevant sections into the Act.

ii. Here, however, when Congress added Section 332(c)(7), Congress expressly made the FCC's pre-existing rulemaking authority under the Act inapplicable:

1. "Except as provided in this paragraph, *nothing in this Act* shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A) (emphasis added).

2. The Conference Report affirms this: "[T]he courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated." H.R. Conf. Rep. No. 104-458 at 208.

b. The FCC has long recognized it lacks authority in this area. *See*, *e.g.*, discussion on the agency's web site at
http://wireless.fcc.gov/siting/local-state-gov.html

including link to an exchange of letters in 1997 between the WTB Chief at that time and the then-President of CTIA.

2. EVEN IF CONGRESS HAD GIVEN THE FCC AUTHORITY, THE FCC COULD NOT READ FIXED TIMELINES INTO SECTION 332(C)(7)(B).

a. Section 332(c)(7)(B) does not ***expressly*** contain fixed timelines for local action.

i. Instead, Section 332(c)(7) uses flexible language to allow analysis of particular requests in context: a "reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request."

ii. Congress contemplated ***and rejected*** specialized timelines: "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests or to subject their requests to any but the generally applicable time frames for zoning decision." H.R. Conf. Rep. No. 104-458 at 208.

b. Congress instructed that the 1996 Act may be construed to preempt local law only if the statute ***expressly*** so provides:

i. "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Section 601(c), 47 U.S.C. § 152 nt.[1]

c. The FCC refused to fix a deadline for its own decisions under Section 332(c)(7)(B)(v) because it was "concerned that doing so will

[1] In contrast, the statutory language at issue in *Alliance for Community Media*, 47 U.S.C. § 541(a)(1), was not added by the 1996 Act, and thus could be construed without regard to this limitation or to the specific legislative history of Section 332(c)(7) above.

not afford the Commission sufficient flexibility to account for the particular circumstances of each case." *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(b)(V) of Communications Act of 1934*, 15 FCC Rcd. 22821, 22827 at ¶ 14 (2000).

3. SECTION 253 DOES NOT APPLY TO LOCAL AUTHORITY OVER SITING DECISIONS, AND IT IS NOT AMENABLE TO CTIA'S PROPOSED INTERPRETATION.

a. Section 253 may not be read to affect local authority over siting decisions.

i. Section 253, like other provisions of the Act, cannot be read to "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A).[2]

b. Even if Section 253 applied, CTIA's proposed reading is inconsistent with the statute's plain language.

i. The statute does not preempt local requirements that "may prohibit." Instead, it preempts only when a plaintiff *demonstrates* that requirements "prohibit or have the effect of prohibiting . . .".

1. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008): "In context, it is clear that Congress' use of the word 'may' works in tandem with the negative modifier '[n]o' to convey the meaning that 'state and local regulations shall not prohibit or have the effect of prohibiting

[2] The statute speaks not just to "decisions" but to "authority . . . over decisions."

telecommunications service.' Our previous interpretation of the word 'may' as meaning 'might possibly' is incorrect.".

2. The FCC has long recognized that a challenger must *demonstrate* a prohibition or effective prohibition based on the record. *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 at ¶ 38 (July 17, 1997); *In the Matter of TCI Cablevision of Oakland County, Inc.*, *Memorandum Opinion and Order*, FCC 97-331, 12 F.C.C.R. 21,396 (September 19, 1997); *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, FCC 98-295, 13 F.C.C.R. 22970, 22,971-72 (November 17, 1998).

3. CTIA's Petition depends on the contrary reading, which CTIA continues to stress despite the 9th Circuit's *en banc* repudiation of CTIA's reading. CTIA Reply Comments at 33 (arguing Section 253 preempts requirements that "may prohibit").

ii. CTIA fails to demonstrate, as it must, that *all* ordinances that automatically require a wireless carrier to seek a variance "prohibit or have the effect of prohibiting . . .".

c. CTIA's request also cannot be squared with Section 253(d).

i. Under Section 253(d), the FCC must provide "notice and opportunity for public comment" and then may only preempt "such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

ii. CTIA has not identified *any* particular local requirements or communities, so the FCC is not in a position to preempt only "to the extent necessary."

4. CTIA HAS FAILED TO SERVE OR IDENTIFY LOCAL AUTHORITIES AS REQUIRED BY FCC RULE AND BY FUNDAMENTAL FAIRNESS.

a. 47 C.F.R. § 1.1206, note 1, requires: "In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. § 332(c)(7)(B)(V), the petitioner must serve the original petition on a state or local government, the actions of which as specifically cited as a basis for requesting preemption." *See also* the related point at 3.c.ii above.

b. Petitioner CTIA has continued to refuse to identify the local governments accused in its petition. These governments are left with no way to provide the FCC with the other side of the story. The FCC should not countenance such anonymous accusations, which contrast sharply with the process used in considering the CTIA anti-moratorium petition of 1996.

c. The experience of the last twelve years shows that the growth of cellular coverage has not been impeded. Rather, the pattern is exactly what one would expect from a reasonable system: most applications are granted very quickly, but for sound reasons a small minority take longer to process. The statutory language provides precisely the flexibility needed to deal with this range of factual situations and needs no elaboration by the FCC.

5. THE RECORD DOES NOT DEMONSTRATE A NEED TO WRITE FIXED TIMELINES INTO THE ACT, BUT IT DOES DEMONSTRATE THE HARM OF ADOPTING SUCH AN APPROACH.

a. CTIA's Petition identified *no* examples of unreasonable behavior by local communities. The survey information cited by the industry is undocumented.

b. The relief available to an aggrieved applicant under Section 332(c)(7)(B)(v) needs no clarification. Once any local deadlines or waiting periods have passed, an applicant is free to claim "failure to act" and commence a court action. Thus, there is no uncertainty here that would need to be resolved.

c. The record shows that adding fixed timelines to Section 332(c)(7) would be disruptive. Such timelines would: (i) undermine the statute's procedural protections; (ii) encourage hasty decisions; (iii) promote the industry to withhold information and refuse to cooperate; and (iv) lead to unnecessary litigation.